



**State of New Jersey**  
OFFICE OF ADMINISTRATIVE LAW

**FINAL DECISION**

**EMERGENT RELIEF**

OAL DKT. NO. EDS 00343-21

AGENCY DKT. NO. 2021 32435

**G.F. AND A.F. ON BEHALF OF M.F.,**

Petitioners,

v.

**TEANECK TWP BOARD OF EDUCATION,**

Respondent.

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**G.F. and A.F.**, pro se, petitioners

**Nathanya G. Simon**, Esq., for respondent (Scarinci Hollenbeck, attorneys)

BEFORE **KELLY J. KIRK**, ALJ:

This matter arises under the Individuals with Disabilities Education Act, 20 U.S.C.A. §§1400 to 1482. On January 12, 2021, petitioners, G.F. and A.F., on behalf of their son, M.F., filed for emergent relief and due process against respondent, Teaneck Township Board of Education (District). The transmittal reflects:

EMERGENT RELIEF: Petitioners obo student seek immediate assignment of a 1:1 instructional aide during remote learning in order to access remote learning, or

immediate placement in an out-of-district program that is conducting in-person instruction.

DUE PROCESS: Petitioners obo student seek an appropriate program in an out-of-district placement with in-person instruction.

The Office of Special Education Policy and Dispute Resolution of the New Jersey Department of Education (Department) transmitted the Request for Emergent Relief to the Office of Administrative Law (OAL), where it was filed on January 13, 2021. In opposition to the Request for Emergent Relief, on January 19, 2021, respondent submitted a letter brief and Certification of Erica Cerilli-Levine, Direction of Special Education/Nursing Services with nine exhibits. In reply to respondent's opposition, petitioner submitted a "surreply" letter brief with four exhibits on January 21, 2021. Additionally, on January 21, 2021, respondent submitted a letter with enclosure and petitioners submitted an email with two attachments. Oral argument was held on January 22, 2021.

Petitioners' Request for Emergent Relief describes the nature of the emergent problem and any facts relating to the problem as follows:

[M.F.] has not been physically in school and has not had in-person supports supplied by the School District since March 16, 2020. The District has failed to provide him with a home instructor on its own when the school went entirely remote. The IEP was changed 12/6/2020 to specify that the District would provide a shadow to provide in-person support. The District to date has failed to supply such shadow. This failure causes irreparable continuing emotional harm [to M.F.]. He is already on several medications, including anti-anxiety medication, due to a documented, preexisting anxiety disorder. Such disorder was only exacerbated by remote learning and COVID-19 generally. He is not being serviced at all. If we wait 45 days to even come to a hearing, and then try to find school placement for him, nothing will be rectified prior to the end of the school year. My son will continue to suffer

and be irreparably harmed. Please see the attached addendum<sup>1</sup> for a complete outline of the emergent issues.

Petitioners' Request for Emergent Relief describes how the problem could be resolved as follows:

[M.F.] can be immediately placed in an out of district school.  
Please see addendum.

Pursuant to N.J.A.C. 6A:14-2.7(s)(1), emergent relief may be requested according to N.J.A.C. 1:6A-12.1 and may be granted if the administrative law judge determines from the proofs that:

- i. The petitioner will suffer irreparable harm if the requested relief is not granted;
- ii. The legal right underlying the petitioner's claim is settled;
- iii. The petitioner has a likelihood of success on the merits of the underlying claim; and
- iv. When the equities and interest of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted.

In order to prevail on an application for emergent relief, the petitioner must meet all four prongs as set forth above. Harm is generally considered irreparable if it cannot be redressed adequately by monetary damages. Crowe v. De Gioia, 90 N.J. 126, 132-133 (1982).

A January 20, 2020 Individualized Education Program (IEP) reflects that M.F.'s special education programs and related services were "In-class Resource (support)" for math, reading, science, social studies, writing and language arts; group occupational

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<sup>1</sup> No "addendum" was transmitted with the emergent relief application and the Due Process Petition reflects a description of the nature of the problem and any facts related to the problem as "Please see letter addendum accompanying this filing."

therapy; group speech-language therapy; and transportation. A December 3, 2020 draft IEP (December IEP) reflects:

1) Due to extended school closure or prevention and mitigation/reopening school plans for emergency reasons such as the COVID-19 outbreak starting March 16, 2020, the child's remote learning plan will be implemented to the greatest extent possible[;] 2) While the COVID-19 remote learning plan is in effect during the 2020-2021 school year, and on days when the district's schedule required [M.F.] to attend school remotely, the district will provide a shadow in the home for up to four hours per day. Please see the Supplementary Aids and Services section below for safety considerations[;] 3) Parents have requested that a Functional Behavioral Assessment be completed to determine the function of any observable behavior and to determine if a Behavior Support Plan is required to meet the student's needs. On 12/3/20 the parents were emailed a request to consent to an FBA. Upon parental consent for this assessment, the FBA will be completed and will consist of 2 to 3 student observations, parent interview, teacher interviews, and the use of rating scales.

The December IEP also reflects M.F.'s eligibility classification was "Autism"; his special education programs and related services as "In-class Resource (support)" for language arts, math, science and social studies; group occupational therapy; group speech-language therapy; and individual and group counseling services; and the concerns of the parents as follows:

The parents asserted that [M.F.] cannot learn in a remote online classroom without an adult being present physically in the home to direct [M.F.] to the task at hand. The parents stated that it has been necessary for them to hire an aide to be with [M.F.] physically in the home to ensure that [M.F.] can make similar progress in the general education curriculum as would a non-disabled peer. The parents claim a denial of FAPE and have requested [M.F.'s] immediate placement in an out of district private school.

At the IEP meeting, the CST recommended that the district support [M.F.] in his home by providing [M.F.] with the services of a shadow for up to four hours on days when [M.F.] is learning remotely. The shadow would support [M.F.] by directing [M.F.] to attend to the academic task at

hand. CST believes that a shadow would provide [M.F.] with substantial opportunities to satisfy FAPE in the least restrictive setting possible in a general education classroom with non-disabled peers.

In response to CST's offer to bring a shadow into the home, the parents expressed objections. The parents do not think that the services of a shadow coming into the house during the pandemic is a practicable or reliable solution. The parents said that staffing a shadow position consistently is speculative at present. The parents point out that a physical school that is open with employees available is better placed to fill the need of a shadow reliably. Furthermore, the parents stated that the district's plan seemingly presumes that the district will only be on a half-day 4-hour schedule moving forward. If the school day returns to a full-day schedule, the parents said that there would not be coverage of a shadow for the entirety of the school day.

The December IEP was signed by the parent on December 10, 2020 and reflects the handwritten notation "under protest." Nevertheless, the December IEP would serve as M.F.'s "stay put" placement.

There is no dispute that the District schools were closed on March 16, 2020 due to the COVID-19 pandemic and that instruction has since been remote or virtual. In the Request for Emergent Relief, the parents allege that the District's failure to supply a shadow to provide in-person support causes "irreparable continuing emotional harm" to M.F., who is on several medications, including anti-anxiety medication for an anxiety disorder that has been exacerbated by remote learning and COVID-19 generally. The parents also allege that M.F. "is not being serviced at all," and "will continue to suffer and be irreparably harmed."

Respondent asserts that M.F.'s remoted learning plan has been implemented to the greatest extent possible in view of the COVID-19 pandemic; that the petitioners signed the December IEP requiring the District to provide a shadow (in-home services) for up to four hours per day on days M.F. was attending remotely; that on December 4, 2020 the District commenced arrangements with Progressive Therapy of NJ (Progressive) to provide in-home services; that Progressive advised that the in-home services would be provided pending fingerprinting approval, but the initial therapist

ultimately became ill and was no longer willing to provide in-home services; that Progressive advised on January 14, 2021 of other COVID-19-related difficulties and that another therapist was located and would commence in-home services on January 27, 2021; and that the District is calculating the number of in-home services hours missed and owed to M.F. as compensatory services.

In reply, petitioners argue that M.F. should be placed out-of-district pending the due process hearing because a physical school setting is the only reliable way to provide a free, appropriate public education (FAPE) or alternatively that M.F.'s in-home services should be increased from four hours per day (8:30 a.m. to 12:30 p.m.) to include the entirety of the school day, and that compensatory services should be ordered. More specifically, petitioners argue that the shadow is incapable of providing compensatory services and that compensatory services should be performed by a licensed teacher, qualified to give educational instruction or if a teacher cannot be procured, it should be by way of an instructional program such as Mathnasium, Sylvan, Kumon, or some other equivalent service to provide educational instruction.

There is no dispute that the District agreed to provide "a shadow in the home for up to four hours per day," as of December 10, 2020 when the parent signed the December IEP. Although the shadow has not yet been provided, the District submitted documentation of its efforts to procure the same and has represented that it will provide make-up services to M.F. to compensate for the shadow hours M.F. should have received since December. The parents argued that they had determined that if M.F. did not have supervision he would not turn on the computer and attend school remotely, so beginning in September and continuing until January 20, 2021 they paid for a "shadow," who provides the support M.F. needs and is the reason he is attending school and doing well. Thus, although petitioners argue that M.F. continues to be irreparably harmed by the District's failure to procure the shadow, there were no submissions beyond Dr. Sabatini's letter relative to such harm and he has had a private shadow assisting him since September 2020. There is no dispute that M.F. is entitled to the services in the December IEP, and the District represented that the in-home services will commence on January 27, 2021 (in two days) for up to four hours per day as per the

December IEP and that M.F. will receive compensatory services. Accordingly, I **CONCLUDE** that petitioners have failed to establish irreparable harm.

The submissions suggest that M.F. is a student diagnosed with mild autism spectrum disorder, attention deficit hyperactivity disorder and obsessive-compulsive disorder, and whose placement has been in general education with in-class supports. It does not appear that his placement was disputed prior to the COVID-19 related school closures and remote/virtual instruction, and the submissions do not suggest that he is a student so severely impacted by his diagnoses that an out-of-district placement would be required as the least restrictive environment. To the contrary, Dr. Sabatini's November 30, 2020 letter states:

In order for [M.F.] to learn in a virtual or remote environment, it is crucial that he be given an aide or paraprofessional who can provide individualized attention to help him stay on task. If this accommodation cannot be provided to [M.F.], an out of district placement is warranted where his special needs can be met and he will be able to learn and achieve his potential.

Dr. Sabatini's letter does not suggest that it is impossible for M.F. to learn in a virtual or remote environment. Rather, it suggests that in order to learn in this manner, M.F. requires an aide or paraprofessional to "stay on task." Dr. Sabatini's letter also reflects that M.F. is "distractible," and performs best where he is able to receive "redirection when off task." This is consistent with the Parent Questionnaire, dated October 15, 2020, which reflects that M.F.'s struggles since March 16, 2020 have been that he "cannot learn virtually without constant supervision". Dr. Sabatini's letter does not suggest that M.F. requires an aide or paraprofessional for instruction on the academic content. Thus, petitioners' arguments that the shadow or compensatory services must be by "a qualified teacher" or "educational instruction" by a third-party provider are not supported by the submissions.

Pursuant to the December IEP, "on days when the district's schedule required [M.F.] to attend school remotely, the district will provide a shadow in the home for up to four hours per day." Although the start time and end time of the school day was disputed, and petitioners argue that in-home services should be ordered for the entire

day, the District asserts that language arts, math, science and social studies instruction – those academic subjects for which he received support per his IEP - would not exceed four hours per day or occur after 12:30 p.m.

In view of the foregoing, I **CONCLUDE** that petitioners have failed at this time to establish that their claims are settled or a likelihood of success on the underlying due process request for an out-of-district placement.

In sum, I **CONCLUDE** that petitioner is not entitled to emergent relief. Accordingly, it is hereby **ORDERED** that petitioners' Request for Emergent Relief is **DENIED**.

This decision on application for emergency relief shall remain in effect until the issuance of the decision on the merits in this matter. The hearing having been requested by the parents, this matter is hereby returned to the Department of Education for a local resolution session, pursuant to 20 U.S.C.A. § 1415 (f)(1)(B)(i).

01/25/21



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DATE

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**KELLY J. KIRK, ALJ**

Date Received at Agency

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01/25/21

Date Mailed to Parties:

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01/25/21